No. 17-___

IN THE

Supreme Court of the United States

HOME DEPOT U.S.A., INC.,

Petitioner,

v.

GEORGE W. JACKSON,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This action was commenced when Citibank, N.A. filed a routine state-court collection action against respondent George W. Jackson. Petitioner Home Depot U.S.A., Inc. was not a party to that action and never became a party to that collection dispute. Jackson then filed a counterclaim against Citibank asserting class-action consumer-protection claims. In addition to naming Citibank, Jackson named Home Depot and another company as original defendants to that counterclaim class action. The Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4, permits "any defendant" in a state-court class action to remove the action to federal court if it satisfies certain jurisdictional requirements. Petitioner Home Depot is an original defendant in the class action at issue here and was never a plaintiff in any claim associated with this case. The question presented is:

Whether an original defendant to a class-action claim can remove the class action if it otherwise satisfies the jurisdictional requirements of the Class Action Fairness Act when the class action was originally asserted as a counterclaim against a co-defendant.

PARTIES TO THE PROCEEDINGS

Petitioner Home Depot, U.S.A., Inc. was an original defendant to the class action brought as a counterclaim in the district court and was the appellant in the court of appeals.

Respondent George W. Jackson was the original defendant and the counterclaim plaintiff in the district court and the appellee in the court of appeals.

Citibank, N.A. was the original plaintiff and the counterclaim defendant in the district court; it did not participate in the proceedings in the court of appeals; it is no longer a party to this case.

Carolina Water Systems, Inc. was an original defendant to the class action brought as a counterclaim in the district court; it did not participate in the proceedings in the court of appeals.

RULE 29.6 STATEMENT

Petitioner Home Depot U.S.A., Inc. is wholly owned by The Home Depot, Inc., a publicly traded company on the New York Stock Exchange. The Home Depot, Inc. has no parent corporation, and no publicly traded corporation owns 10% or more of its stock.

TABLE OF CONTENTS

QUESTION PRESENTED i
PARTIES TO THE PROCEEDINGS ii
RULE 29.6 STATEMENT ii
TABLE OF AUTHORITIES iv
PETITION FOR A WRIT OF CERTIORARI 1
OPINIONS BELOW 1
JURISDICTION 1
RELEVANT STATUTORY PROVISIONS 1
INTRODUCTION 2
STATEMENT 3
REASONS FOR GRANTING THE WRIT 9
I. This Court Should Grant Review To Correct The Courts Of Appeals' Erroneously Broad Interpretation Of *Shamrock Oil* 9
A. Only This Court Can Clarify The Scope Of *Shamrock Oil* 10
B. The Courts Of Appeals Have Misconstrued An Important Statute Governing The Jurisdiction Of Federal Courts 16
II. The Question Presented Is Important And Recurring 22
CONCLUSION 26
APPENDIX A: Opinion of the Court of Appeals (4th Cir. 2018) 1a
APPENDIX B: Opinion of the District Court (W.D.N.C. 2017) 16a

TABLE OF AUTHORITIES

Cases

Ali v. Fed. Bureau of Prisons,
552 U.S. 214 (2008) 18, 19, 20

Am. Bus Ass'n v. Slater,
231 F.3d 1 (D.C. Cir. 2000) 18

Bank of Am. Corp. v. City of Miami,
137 S. Ct. 1296 (2017) 9

Bank of Am. v. All About Drapes, Inc.,
2017 WL 4127489
(Ill. App. Ct. Sept. 15, 2017) 24

Brooks v. Zabka,
450 P.2d 653 (Colo. 1969) 18

Credit Acceptance Corp. v. Hinton,
2018 WL 793934
(Conn. Super. Ct. Jan. 16, 2018) 24

Dart Cherokee Basin Operating Co. v. Owens,
135 S. Ct. 547 (2014) 5, 8, 21, 22

Dupreez v. GMAC, Inc.,
2017 WL 6016592
(Md. Ct. Spec. App. Dec. 5, 2017) 24

Epps v. Bank of Am. N.A.,
2017 WL 5513258
(Md. Ct. Spec. App. Nov. 17, 2017) 24

First Bank v. DJL Props., LLC,
598 F.3d 915 (7th Cir. 2010) 13, 19

Ford Motor Credit Co. v. Jones,
— S.W.3d —, 2018 WL 1384505
(Mo. Ct. App. Mar. 20, 2018) 24

Gross v. FBL Fin. Servs., Inc.,
557 U.S. 167 (2009) 17

Hardt v. Reliance Standard Life Ins. Co.,
560 U.S. 242 (2010) 17

Henson v. Santander Consumer USA Inc.,
137 S. Ct. 1718 (2017) 18

In re Mortg. Elec. Registration Sys., Inc.,
680 F.3d 849 (6th Cir. 2012) 13, 14

Midland Funding, LLC v. Raney,
93 N.E.3d 724 (Ill. App. Ct. 2018) 24

Palisades Collections LLC v. Shorts,
552 F.3d 327 (4th Cir. 2008) ..... *passim*

Polito v. Keybank Nat'l Ass'n,
237 So. 3d 361 (Fla. Dist. Ct. App. 2017) 24

Shamrock Oil & Gas Corp. v. Sheets,
313 U.S. 100 (1941) ..... *passim*

Tri-State Water Treatment, Inc. v. Bauer,
845 F.3d 350 (7th Cir. 2017) ..... *passim*

United States v. Gonzales,
520 U.S. 1 (1997) 18

Westwood Apex v. Contreras,
644 F.3d 799 (9th Cir. 2011) ..... *passim*

Statutes

Act of Mar. 3, 1875, ch. 137, 18 Stat. 470 11

Act of Mar. 3, 1887, ch. 337, 24 Stat. 552 11

Class Action Fairness Act of 2005,
Pub. L. No. 109-2, 119 Stat. 4 ..... *passim*

28 U.S.C. § 1441 ..... 14, 21

28 U.S.C. § 1441(a) ..... *passim*

28 U.S.C. § 1446 ..... 18, 20, 21

28 U.S.C. § 1446(b) 20, 21

28 U.S.C. § 1453(b) ..... *passim*

28 U.S.C. § 71 (1940) 4, 10
28 U.S.C. § 1254(1) 1

Rules

Fed. R. Civ. P. 12 ..... 19, 20

Other Authorities

H.R. Rep. No. 49-1078 (1886) 11
Dan Himmelfarb, *Fourth Circuit Ruling Permits Broad Circumvention of Class Action Fairness Act*, Legal Opinion Letter (Wash. Legal Found.), Apr. 10, 2009 ..... 17, 23
Lonny Sheinkopf Hoffman, *Burdens of Jurisdictional Proof*, 59 Ala. L. Rev. 409 (2008) 22
S. Rep. No. 109-14 (2005) ..... *passim*
Jay Tidmarsh, *Finding Room for State Class Actions in a Post-CAFA World: The Case of the Counterclaim Class Action*, 35 W. St. U. L. Rev. 193 (2007) 23, 24
Webster's Third New International Dictionary (1976) 18

PETITION FOR A WRIT OF CERTIORARI

Petitioner Home Depot U.S.A., Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 880 F.3d 165. The opinion of the district court (Pet. App. 16a-23a) is not published in the *Federal Supplement* but is available at 2017 WL 1091367.

JURISDICTION

The judgment of the court of appeals was entered on January 22, 2018. Pet. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

28 U.S.C. § 1441(a) provides:

> GENERALLY.—Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

28 U.S.C. § 1453(b) provides:

> IN GENERAL.—A class action may be removed to a district court of the United States in accordance with section 1446 (except that the 1-year limitation under section 1446(c)(1)

> shall not apply), without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants.

INTRODUCTION

This petition raises "an important issue of statutory interpretation" governing the jurisdiction of federal courts and asks this Court to close "an unfortunate loophole in the Class Action Fairness Act that only the Supreme Court can now rectify." *Palisades Collections LLC v. Shorts*, 552 F.3d 327, 345 (4th Cir. 2008) (Niemeyer, J., dissenting from the denial of rehearing en banc). Congress enacted the Class Action Fairness Act of 2005 (CAFA), Pub. L. No. 109-2, 119 Stat. 4, to curb state-court abuses of interstate class actions by facilitating the removal of class actions by "any defendant." 28 U.S.C. § 1453(b). Home Depot is indisputably a defendant to the class-action claims asserted by respondent George W. Jackson—and that is Home Depot's *only* role in this litigation. Under the plain text of CAFA, Home Depot is therefore indisputably "any defendant" and is entitled to remove the class-action claims against it. But every court of appeals to consider the question presented has held that a defendant like Home Depot cannot remove the class-action claims against it because it was not an original defendant in a routine collection action between other parties. From the perspective of ordinary statutory construction, that conclusion makes no sense.

Although ordinarily the absence of a circuit conflict is a reason to deny a petition for a writ of certiorari, in this case the opposite is true: the unanimity

among courts of appeals in embracing a counter-textual interpretation of Section 1453(b) requires this Court's immediate intervention because the circuit courts view broad language in *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941), as *requiring* them to adopt that nonsensical construction. Only this Court can clarify the scope of *Shamrock Oil* and restore to CAFA its plain meaning.

CAFA is a statute that governs the removal of class actions. It authorizes "any defendant" in a qualifying class action to remove the class action to federal court. Congress could not have used simpler or more straightforward language to give "any" class-action defendant a right of removal. Home Depot is a class-action defendant in a state-court forum it did not choose. It should be able to remove the class action under CAFA. But without this Court's intervention, it will continue to be trapped in state court defending against class-action claims that Congress intended to be heard in federal court. The Court should grant this Petition to correct that injustice.

STATEMENT

1. a. The general removal statute provides that "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by *the defendant or the defendants*, to the [appropriate] district court of the United States." 28 U.S.C. § 1441(a) (emphasis added). In *Shamrock Oil & Gas Corp. v. Sheets*, this Court interpreted the predecessor to Section 1441(a), which authorized removal of a state-court action "of which the district courts of the United States are given original jurisdiction" when removal was sought "by the

defendant or defendants therein." 313 U.S. 100 (1941) (quoting 28 U.S.C. § 71 (1940)). The Court held that that provision did not authorize removal of a counterclaim by a party who was the original plaintiff (and counterclaim defendant) in the state-court action. *Id.* at 104-109. The Court explained that the removal provision in place from 1875 to 1887 had authorized removal by "either party"—but that essentially every other removal statute enacted since 1789 had limited "the privilege of removal to 'defendants' alone." *Id.* at 105; *id.* at 105-106. The Court viewed the "alterations in the statute" to be of "controlling significance as indicating the Congressional purpose to narrow the federal jurisdiction on removal," *id.* at 107, and "to restrict the jurisdiction of the federal courts on removal," *id.* at 108. Concluding that the removal provision must be subject to a "strict construction," the Court found "no basis for saying that Congress, by omitting from the [operative] statute all reference to 'plaintiffs,' intended to save a right of removal to some plaintiffs and not to others." *Ibid.*

b. In 2005, Congress enacted CAFA to address what it perceived as "abuses" of the class-action system. S. Rep. No. 109-14, at 4 (2005) (Senate Report). In particular, the Senate Report explained that Congress was concerned that "most class actions" were being "adjudicated in state courts, where the governing rules are applied inconsistently (frequently in a manner that contravenes basic fairness and due process considerations) and where there is often inadequate supervision over litigation procedures and proposed settlements." *Ibid.* The Senate Report observed that existing "law enable[d] lawyers to 'game' the procedural rules and keep nationwide or multi-state class

actions in state courts whose judges have reputations for readily certifying classes and approving settlements without regard to class member interests"—and that, as a result, "consumers are the big losers." *Ibid.* To address those problems, Congress amended the provisions governing federal diversity jurisdiction over class actions. As relevant here, Congress "modifie[d] the federal removal statutes to ensure that qualifying interstate class actions initially brought in state courts may be heard by federal courts if any of the defendants so desire." *Id.* at 5; *see id.* at 6 ("This Committee believes that the current diversity and removal standards as applied in interstate class actions have facilitated a parade of abuses . . . .").

By enacting CAFA, Congress sought to change existing laws that "enable[d] plaintiffs' lawyers who prefer to litigate in state courts to easily 'game the system' and avoid removal of large interstate class actions to federal court." Senate Report 10. "In order to enable more class actions to be removed to federal court," Congress therefore enacted 28 U.S.C. § 1453(b), which provides for removal of class actions (under broader diversity jurisdiction established by other parts of CAFA) "by any defendant without the consent of all defendants." Senate Report 29. In construing CAFA's application to removal proceedings, this Court has noted that "no antiremoval presumption attends cases invoking CAFA, which Congress enacted to facilitate adjudication of certain class actions in federal court." *Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547, 554 (2014).

2. a. This case arises out of a debt-collection action filed in June 2016 in North Carolina state court by Citibank, N.A. against respondent Jackson. Pet.

App. 2a. Citibank alleged that Jackson had failed to pay for a water-treatment system he purchased using a Citibank-issued credit card. *Id.* at 2a-3a.

In his August 2016 answer to the complaint, Jackson asserted a class-action counterclaim against plaintiff Citibank and against petitioner Home Depot and Carolina Water Systems, Inc. (CWS), neither of which was a party to the original collection action. Pet. App. 2a. Jackson alleged that Home Depot and CWS had engaged in unfair and deceptive trade practices by misleading consumers about the water-treatment systems sold by CWS as part of an agreement with Home Depot and that Citibank was jointly and severally liable because Home Depot "directly sold or assigned the transaction to Citibank." *Id.* at 3a (citation omitted). In September 2016, Citibank voluntarily dismissed its collection claims against Jackson without prejudice. *Ibid.*

In October 2016, Home Depot filed a notice of removal, relying on CAFA. Pet. App. 3a. Because the only controversy remaining in the case was the class action filed by Jackson, Home Depot then filed a motion to realign the parties to denominate Jackson as plaintiff and Home Depot, CWS, and Citibank as defendants. *Ibid.* On November 8, 2016, Jackson filed a motion to remand. *Ibid.* On November 18, Jackson amended his class-action complaint to remove any reference to Citibank. *Ibid.* At that point, the only remaining controversy was Jackson's class-action claims against Home Depot and CWS, neither of which was a plaintiff in (or even a party to) the original debt-collection action filed in state court by Citibank.

In March 2017, the district court denied Home Depot's motion to realign the parties, explaining that

"[t]his is not a situation where there are antagonistic parties on the same side" and noting that Citibank had "dismissed its claim against Jackson *without prejudice*." Pet. App. 22a. The court also granted Jackson's motion to remand, reasoning that, because Home Depot was not an original defendant in the collection action that started the case, it was not entitled to remove what remained of the case (*i.e.*, the class action). Pet. App. 19a-21a.

b. Home Depot appealed, and the court of appeals affirmed. Pet. App. 1a-15a.

The court of appeals first affirmed the district court's remand order. Pet. App. 4a-14a. The court explained that 28 U.S.C. § 1441(a) limits the right of removal to "the defendant or the defendants." Pet. App. 4a. Relying on *Shamrock Oil*, which construed similar language, the court held that Section 1441(a) does not authorize removal by a defendant to a claim asserted as a counterclaim—even when that defendant was not an original plaintiff in the suit. *Id.* at 4a-9a.

The court of appeals rejected Home Depot's argument that CAFA, which allows removal by "any defendant," 28 U.S.C. § 1453(b), expands the class of defendants who can remove a case to include an original defendant to a class action asserted as a counterclaim when the defendant was not an original plaintiff (or any kind of plaintiff) in the case. Pet. App. 8a-14a. The court relied on circuit precedent—and decisions from two other circuits—holding that CAFA does not permit removal by a defendant to a counterclaim even when the defendant was not an original plaintiff. *Id.* at 7a (citing *Tri-State Water Treatment, Inc. v. Bauer*, 845 F.3d 350, 355-356 (7th Cir.), *cert. denied*, 137 S. Ct. 2138 (2017); *Westwood Apex v. Contreras*,

644 F.3d 799 (9th Cir. 2011); *Palisades Collections LLC v. Shorts*, 552 F.3d 327, 334-336 (4th Cir. 2008)). The court further rejected Home Depot's argument that this Court's decision in *Dart Cherokee Basin Operating Co.*, *supra*—which clarified that CAFA eliminates any antiremoval presumption for covered class actions—undermines the viability of those circuit court decisions. *Id.* at 9a-11a.

The court of appeals also rejected Home Depot's argument that the holdings of *Shamrock Oil* and of the circuit cases applying CAFA to counterclaim defendants do not apply to Home Depot because it is not a counter-defendant or a third-party defendant, but is simply a defendant in the only dispute remaining in this case. Pet. App. 11a-14a. In so holding, the court relied on the fact that, at the time Home Depot filed its notice of removal, Jackson had not yet dismissed his claims against Citibank (the original plaintiff). *Id.* at 12a. The court reasoned that accepting Home Depot's argument would permit gamesmanship because it would permit an original plaintiff to remove an otherwise unremovable counterclaim class action by dismissing its original claims. *Id.* at 13a-14a.

Finally, the court of appeals affirmed the district court's refusal to realign the parties. Pet. App. 14a-15a. Although the court acknowledged that it employs a "'principal purpose' test, in which [the court] determine[s] the primary issue in controversy and then align[s] the parties according to their positions with respect to that issue," *id.* at 14a, it refused to make such an alignment in this case because no party was attempting to evade limits on diversity jurisdiction, *id.* at 15a.

REASONS FOR GRANTING THE WRIT

This is the rare case that warrants this Court's review absent a circuit conflict because courts of appeals have unanimously agreed that broad language in this Court's decision in *Shamrock Oil & Gas Co. v. Sheets*, 313 U.S. 100 (1941), requires a holding that the plain language of 28 U.S.C. § 1453(b) cannot mean what it says. That broad language, if taken literally, greatly expands the holding of *Shamrock Oil* beyond its reasoning and far beyond the question actually presented in that case. Because courts of appeals take seriously this Court's admonitions that they must take this Court's decisions at face value unless or until this Court says otherwise, they are not free to construe the words of Section 1453(b) in their ordinary sense—and will not be free to do so unless or until this Court intervenes to clarify the reach of *Shamrock Oil*. This Court's intervention is warranted at this time to correct the circuit courts' errant course in this area. *See Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1311 (2017) (Thomas, J., concurring in part and dissenting in part) (noting that the Court granted certiorari "despite the absence of a circuit conflict" to clarify the meaning of the Court's own precedents).

I. This Court Should Grant Review To Correct The Courts Of Appeals' Erroneously Broad Interpretation Of *Shamrock Oil*.

The question presented in *Shamrock Oil* was whether the general removal statute authorized an original plaintiff in a state-court action to remove that action to federal court based on a counterclaim asserted by the defendant. 313 U.S. at 102-104. The answer was no. *Id.* at 106-109. That is *not* the question

presented in this case because this case does not involve removal by a plaintiff and does not involve removal under the general removal statute or under a statute employing the same limiting language as the general removal statute. Nevertheless, every court of appeals to consider the question presented (four so far) has held that the question whether an original counterclaim defendant can remove a class action under CAFA is controlled by broad language in *Shamrock Oil* that cannot mean what it says. This Court should grant this Petition to clarify the reach of *Shamrock Oil* and to restore to CAFA its plain and ordinary meaning.

A. Only This Court Can Clarify The Scope Of *Shamrock Oil*.

1. In construing the predecessor to today's general removal statute, this Court held in *Shamrock Oil* that a plaintiff in a state-court action cannot remove that action to federal court under the general removal provision in response to a counterclaim. 313 U.S. at 104-109. In so holding, the Court relied on the text and purpose of the operative statute. Although neither the text nor purpose of that statute corresponds to the text and purposes of CAFA, courts of appeals have felt bound to apply *Shamrock Oil* to the question presented because the Court used broad language in describing the holding of *Shamrock Oil*.

The removal provision at issue in *Shamrock Oil*—like the general removal provision in operation today, 28 U.S.C. § 1441(a)—authorized removal "by the defendant or defendants" when certain other requirements were met. 313 U.S. at 104 & n.1 (quoting 28 U.S.C. § 71 (1940)); *see* 28 U.S.C. § 1441(a)

(authorizing removal by "the defendant or the defendants"). In analyzing the text, the Court focused on the phrase "by the defendant or defendants," which established a limit on the scope of removal that had not existed in a predecessor statute. 313 U.S. at 104-106. The 1875 version of the general removal statute, the Court explained, had permitted removal by "either party, or any one or more of the plaintiffs or defendants" when other conditions were satisfied. *Id.* at 106 (quoting Act of Mar. 3, 1875, ch. 137, § 3, 18 Stat. 470, 471). Congress amended that provision in 1887 to limit the right of removal to "the defendant or defendants," Act of Mar. 3, 1887, ch. 337, § 1, 24 Stat. 552, 553, a limitation that remained in the version of the statute at issue in *Shamrock Oil* and continues in nearly identical form today, *see* 28 U.S.C. § 1441(a) (limiting removal to "the defendant or the defendants").

Relying on the House Report that accompanied the 1887 Act, the Court explained that the purpose of the amendment was "to narrow the federal jurisdiction on removal" by "'requir[ing] the plaintiff to abide his selection of a forum'" when a plaintiff sues in state court. *Shamrock Oil*, 313 U.S. at 106 n.2, 107 (quoting H.R. Rep. No. 49-1078, at 1 (1886)). In light of that statutory purpose, the Court construed the statute's restriction of removal authority to "the defendant or defendants" *not* to include an original plaintiff who later became a counterclaim defendant. *Id.* at 106-109. Such a party, although technically a defendant to the counterclaim, could not be considered "the defendant" in the case because that party had *chosen* the state-court forum and was not an original defendant—*i.e.*, was not "the defendant or defendants." *Id.* at 107-

108. The Court thus found "no basis for saying that Congress, by omitting from the [then-operative] statute all reference to 'plaintiffs,' intended to save a right of removal to some plaintiffs and not to others." *Id.* at 108.

2. Understood that way, the holding of *Shamrock Oil* does not control the question presented in this case—because Home Depot was not the original plaintiff, did not choose the state-court forum, cannot be considered a plaintiff in any aspect of this case, and did not seek removal under 28 U.S.C. § 1441(a) or under any other statutory provision that limits removal authority to "the defendant or the defendants." Because *Shamrock Oil* uses unnecessarily broad language in describing its holding, however, courts of appeals have felt bound to construe that decision broadly. As a result, those courts have held that removal can be accomplished *only* by a party that is a defendant to the original plaintiff's state-court action—and that *Shamrock Oil* requires that result. As Judge Bybee explained in a concurring opinion, "[o]ver time, the holding of *Shamrock Oil*—that an original plaintiff could not remove the case after a counterclaim was filed—transformed into a rule that only the original defendant could remove the case." *Westwood Apex v. Contreras*, 644 F.3d 799, 808 (9th Cir. 2011). Courts of appeals have thereby extended the holding of *Shamrock Oil* far beyond the circumstances of that case—and well beyond the reasoning of that case—to prohibit removal by a party that was involuntarily brought into a state-court action as a defendant when that party is a defendant to a counterclaim.

3. "For more than fifty years, courts applying *Shamrock Oil* have consistently refused to grant

removal power under § 1441(a) to third-party defendants." *Palisades Collections LLC v. Shorts*, 552 F.3d 327, 332 (4th Cir. 2008). As explained, that extension of *Shamrock Oil* is questionable. But that is not the subject of this Petition. In recent years, four courts of appeals have taken their extension of *Shamrock Oil* even further, viewing that decision as controlling the construction of a *different* (non-general) removal statute that uses *different* wording.

The Fourth, Sixth, Seventh, and Ninth Circuits have held that a third-party defendant to a class-action counterclaim may not remove the class action under CAFA because, although such a party is undoubtedly a defendant to the class action, under *Shamrock Oil* it cannot be considered "any defendant" under CAFA, 28 U.S.C. § 1453(b). Those courts have justified that counter-textual holding by explaining that *Shamrock Oil* construed the term "defendant" in the general removal provision rather than the more specific term "the defendant." *See* Pet. App. 9a; *Tri-State Water Treatment, Inc. v. Bauer*, 845 F.3d 350, 355 (7th Cir.), *cert. denied*, 137 S. Ct. 2138 (2017); *In re Mortg. Elec. Registration Sys., Inc.*, 680 F.3d 849, 853 (6th Cir. 2012); *Westwood Apex*, 644 F.3d at 804-805 (9th Cir.); *Palisades*, 552 F.3d at 334-335 & n.4 (4th Cir.); *see also First Bank v. DJL Props., LLC*, 598 F.3d 915, 917 (7th Cir. 2010) (using same reasoning with respect to class-action defendant that was original plaintiff).

Thus, for example, the Ninth Circuit held in *Westwood Apex* that a party that was a counterclaim defendant (but not a plaintiff in any capacity) could not remove a class action pursuant to CAFA because *Shamrock Oil* "established [the] meaning of 'defend-

ant' in Chapter 89 of the Judicial Code." 644 F.3d at 804. Because in that court's view the "accepted understanding of 'defendant' as excluding plaintiff/counterclaim defendants and third-party defendants" was established by *Shamrock Oil*, it viewed as irrelevant that CAFA modifies the term "defendant" with the adjective "any" rather than the definite article "the." *Id.* at 805. The Seventh Circuit similarly held that a counterclaim defendant that plays no other role in the litigation (*i.e.*, is not a plaintiff, no matter how broadly that term is construed) cannot be considered "the defendant" under 28 U.S.C. § 1441 or "any defendant" under CAFA, *id.* § 1453(b), because *Shamrock Oil* "established" the meaning of "the term 'defendant.'" *Tri-State Water Treatment*, 845 F.3d at 355. The same is true of the Fourth and Sixth Circuits. Pet. App. 9a; *In re Mortg. Elec. Registration Sys.*, 680 F.3d at 853; *Palisades*, 552 F.3d at 335. In the decision below, the Fourth Circuit expressly stated that it could not permit removal in this case because this Court has not "abandoned *Shamrock Oil*'s definition of 'defendant' in the class action context." Pet. App. 9a.

Although the circuit courts' understanding of the holding of *Shamrock Oil* extends beyond both the question presented and the statutory text at issue in *Shamrock Oil*, it has some basis in the literal wording of the Court's opinion. In the course of explaining the evolution of the general removal statute, for example, the Court noted that Congress had for the most part "given the privilege of removal to 'defendants' alone." *Shamrock Oil*, 313 U.S. at 105. The Court also reasoned that Congress intended "to narrow the federal jurisdiction on removal" when it "omi[tted]" "the phrase 'either party'" and "substitut[ed] for it . . . the

phrase authorizing removal by the 'defendant or defendants' in the suit." *Id.* at 107; *see ibid.* (noting that the general removal statute required "that the removal petition be filed by the 'defendant' at or before the time he is required to plead in the state court"). By repeatedly purporting to interpret the term "defendant" rather than the full statutory term "*the* defendant," the Court in *Shamrock Oil* perhaps unwittingly constrained lower courts' ability to interpret the word "defendant" when used with a different modifier.

Significantly, the Court in *Shamrock Oil* had no occasion to consider whether the statutory term "the defendants" would encompass a party who was not an original plaintiff, did not voluntarily submit itself to the jurisdiction of the state court on a claim that could be heard in federal court, and could not be described as a "plaintiff" in any sense of that word. Moreover, none of the reasoning the Court employed to explain its holding that an original *plaintiff* could not remove a case under the general removal statute would apply to a party that was brought into a matter through service of process as an original defendant to a counterclaim: such a party did not select the state-court forum, *Shamrock Oil*, 313 U.S. at 106 n.2, and permitting removal by such a party would not "save a right of removal to some plaintiffs and not to others," *id.* at 108.

Because courts of appeals are not free to narrowly construe broad language in this Court's opinions, even when there is reason to believe that this Court might do so, they will continue to erroneously restrict removal authority unless this Court steps in to clarify the limits of *Shamrock Oil*. In his dissenting opinion in *Palisades*, Judge Niemeyer explained that "reading

'defendant' consistently does not mean [a court] must read '*any* defendant' in § 1453(b) the same as '*the* defendant or *the* defendants' in § 1441(a)." 552 F.3d at 340. But Judge Niemeyer also explained (in the course of dissenting from the denial of rehearing en banc in that case) that "only the Supreme Court" will be able to "rectify" courts of appeals' error in construing the phrase "any defendant" in CAFA. *Id.* at 345; *see Tri-State Water Treatment*, 845 F.3d at 356 ("If that is where the Supreme Court is going, it will have to get there on its own; it is not for us to anticipate such a move."). Judge Bybee, in his concurring opinion in *Westwood Apex*, similarly explained that, although the holding of *Shamrock Oil* has been interpreted to restrict removal to a defendant to a claim by the original plaintiff, "*Shamrock Oil*'s rationale" "does not compel" that result. 644 F.3d at 807-808. The Court should grant this Petition to hold exactly that.

B. The Courts Of Appeals Have Misconstrued An Important Statute Governing The Jurisdiction Of Federal Courts.

Congress enacted CAFA because the existing "diversity and removal standards as applied in interstate class actions have facilitated a parade of abuses" by preventing large class actions from being adjudicated in federal court. Senate Report 6. Because existing "law enable[d] plaintiffs' lawyers who prefer to litigate in state courts to easily 'game the system' and avoid removal of large interstate class actions to federal court," *id.* at 10, Congress eased the requirements of removal in the hope of "minimiz[ing] the class action abuses taking place in state courts and ensur[ing] that these cases can be litigated in a proper forum," *id.* at

27; *see id.* at 26 ("Under current law, . . . plaintiffs' lawyers can easily manipulate their pleadings to ensure that their cases remain at the state level."). The decision below—and the similar decisions of the Sixth, Seventh, and Ninth Circuits—significantly undermines Congress's purpose by creating a giant "loophole" in CAFA's protections "that only [this] Court can now rectify." *Palisades*, 552 F.3d at 345 (Niemeyer, J., dissenting from the denial of rehearing en banc). Indeed, one commenter has noted that the term "'loophole' may not be an adequate term" because the "rule adopted by" the courts of appeals "is tantamount to a determination that CAFA's removal provision simply has no application to the very substantial proportion of class actions that can be pleaded as counterclaims." Dan Himmelfarb, *Fourth Circuit Ruling Permits Broad Circumvention of Class Action Fairness Act*, Legal Opinion Letter (Wash. Legal Found.), Apr. 10, 2009, at 2 (Himmelfarb).

The courts of appeals' narrow interpretation of removal authority under CAFA has no basis in the text of that statute or of any related removal provision. As always, statutory interpretation must begin with the plain text of a statute, "assum[ing] that the ordinary meaning of that language accurately expresses the legislative purpose." *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010) (quoting *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175 (2009)) (brackets in original). In that endeavor, the Court has emphasized that it "must enforce plain and unambiguous statutory language according to its terms." *Ibid.*

As relevant here, CAFA provides that a class action satisfying certain jurisdictional requirements "may be removed to a district court of the United

States in accordance with" 28 U.S.C. § 1446, "except that such action may be removed *by any defendant* without the consent of all defendants," *id.* § 1453(b) (emphasis added). Section 1453(b) departs from Section 1441(a)'s grant of removal authority in significant respects. Whereas Section 1441(a) restricts removal power to "the defendant or the defendants," *id.* § 1441(a), Section 1453(b) permits removal by "any defendant," *id.* § 1453(b). "[U]sually at least, when [this Court is] engaged in the business of interpreting statutes [the Court] presume[s] differences in language like this convey differences in meaning." *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1723 (2017). "[I]t is a rule of law well established that the definite article 'the' particularizes the subject which it precedes. It is a word of limitation as opposed to the indefinite or generalizing force of 'a' or 'an.'" *Am. Bus Ass'n v. Slater*, 231 F.3d 1, 4-5 (D.C. Cir. 2000) (quoting *Brooks v. Zabka*, 450 P.2d 653, 655 (Colo. 1969) (en banc)). In contrast, "[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (quoting *Webster's Third New International Dictionary* 97 (1976)). Accordingly, "Congress' use of 'any' to modify '[defendant]'" in CAFA "is most naturally read to mean [defendants] of whatever kind." *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 220 (2008). It cannot be gainsaid that Home Depot is a defendant "of whatever kind" in this matter—in fact, its *only* role in this litigation is as a defendant to class-action claims. Under the plain meaning of Section 1453(b), therefore, Home Depot should have been permitted to remove this case to federal court.

The reasons offered by the courts of appeals to support their contrary conclusions are not persuasive. First, because those courts have construed *Shamrock Oil* as defining the word "defendant" for purposes of all removal statutes—but not for other purposes (*see, e.g.*, references in Federal Rule of Civil Procedure 12 to "A defendant" and "the defendant," which necessarily include Home Depot)—they have felt bound to ignore the plain meaning of the phrase "any defendant." *See, e.g.*, *Tri-State Water Treatment*, 845 F.3d at 354 (relying on explanation in *First Bank*, 598 F.3d at 917, that "'[a]ny' is inclusive, to be sure, but the word that it modifies remains 'defendant' [as defined] under *Shamrock Oil*."). The Seventh Circuit has explained that, "[i]f the drafters of [CAFA] wanted to negate *Shamrock Oil*, they could have written 'defendant (including a counterclaim defendant)'" but instead "chose the unadorned word 'defendant,' a word with a settled meaning." *First Bank*, 598 F.3d at 917; *see Tri-State Water Treatment*, 845 F.3d at 354 ("*First Bank* does much of the work that is necessary to resolve the present appeal."). This Court has expressly rejected that type of could-have reasoning to circumvent the plain meaning of statutory text. In the course of interpreting the phrase "any other law enforcement officer" in *Ali*, this Court explained:

> Petitioner would require Congress to clarify its intent to cover all law enforcement officers by adding phrases such as "performing any official law enforcement function," or "without limitation." But Congress could not have chosen a more all-encompassing phrase than "any other law enforcement officer" to express that intent. We have no reason to demand

> that Congress write less economically and more repetitiously.

Ali, 552 U.S. at 221. So too here: there is no reason to demand that Congress specify each type of defendant who may remove under CAFA when Congress has already specified that *any defendant* may remove under CAFA. Home Depot is a defendant. The Seventh Circuit's reasoning is particularly out of step in this case—as it was in *Tri-State Water Treatment*—because Home Depot is not even a counterclaim defendant. Because Home Depot is not a plaintiff, Jackson's class-action claims against Home Depot are not "counter" to anything—they are simply class-action claims and Home Depot is simply the defendant to those claims under any ordinary meaning of that term. *See* Fed. R. Civ. P. 12.

Second, courts of appeals have reasoned that the word "defendant" in Section 1453(b) must be construed to mean the same thing that it means in 28 U.S.C. § 1446(b), which sets forth the procedures for removal and uses the phrase "the defendant." *See, e.g.*, *Tri-State Water Treatment*, 845 F.3d at 354; *Westwood Apex*, 644 F.3d at 806; *Palisades*, 552 F.3d at 334-335. That explanation makes little sense in light of Section 1453(b)'s express instruction that courts should *depart* from the default rules in Section 1446(b). Section 1453(b) provides that a class action may be removed "in accordance with" Section 1446 "*except that* such action may be removed by *any defendant* without the consent of all defendants." 28 U.S.C. § 1453(b) (emphases added). Congress could not have been clearer in expressing its intent to establish removal authority for class actions that is *different* in scope from the

general removal authority set forth in Sections 1441 and 1446.

Some courts of appeals, including the court below, Pet. App. 7a (citing *Palisades*, 552 F.3d at 335), have dismissed Congress's use of an "except" clause by noting that the phrase following "except" has effect of departing from Section 1446's baseline rule that a defendant cannot remove a case without the consent of all other defendants. It is true that part of the text that follows "except" accomplishes that goal—by specifying that a defendant can remove an eligible class action "without the consent of all defendants." 28 U.S.C. § 1453(b). But Congress *also* used the phrase "any defendant" to describe the degree to which CAFA removal is "except[ed]" from the background removal principals. The introduction of the phrase "any defendant" (rather than "the defendant" as used in Sections 1441(a) and 1446(b)) would have no purpose—indeed, would be superfluous—if Congress's only goal was to depart from the unanimity rule, a goal it accomplished unambiguously with different statutory text.

Finally, the court of appeals justified its countertextual reading of "any defendant" by hypothesizing that construing the phrase "any defendant" to include any defendant as that term is ordinarily understood would "invite gamesmanship" by permitting a class action defendant that was an original plaintiff "to disrupt unfavorable proceedings in state court." Pet. App. 13a. That reasoning is wrong for two reasons. First, it ignores that Congress's purpose in enacting CAFA was to permit "any" class-action "defendant" to disrupt unfavorable state-court class-action proceedings. As this Court recently explained in *Dart Cherokee Basin Operating Co. v. Owens*, any anti-removal

presumption that might exist with respect to ordinary diversity jurisdiction does not "attend[] cases invoking CAFA, which Congress enacted to facilitate adjudication of certain class actions in federal court." 135 S. Ct. 547, 554 (2014). Second, as explained more fully below, the rule adopted by four courts of appeals invites gamesmanship by class-action plaintiffs, not by class-action defendants. A wily plaintiffs' attorney need only wait for a potential class-action defendant—or, as here, for any other party loosely affiliated with such a potential defendant—to file a run-of-the-mill state-court collection action that can then be transformed into a vehicle for a non-removable interstate class action. That cannot be what Congress intended when it enacted CAFA—and it cannot be what this Court intended when it decided *Shamrock Oil*.

II. The Question Presented Is Important And Recurring.

The question presented is exceedingly important. CAFA has been described as "the most significant legislative reform of complex litigation in American history." Lonny Sheinkopf Hoffman, *Burdens of Jurisdictional Proof*, 59 Ala. L. Rev. 409, 410 (2008). But the decisions of the Fourth, Sixth, Seventh, and Ninth Circuits provide a roadmap for circumventing the clear purpose of the Act. A plaintiffs' attorney need not even be particularly enterprising to find a debt-collection proceeding or other minor state-court litigation to use as a vehicle for asserting an interstate class-action claim against an entity that is not even a party to the state-court action. The risk of such behavior is particularly high for class actions asserting consumer-protection claims—a category that comprises a significant percentage of all class actions eligible for federal

jurisdiction. Himmelfarb 2. From the perspective of that class-action defendant, the commencement of a class action as a counterclaim is no different from the commencement of a stand-alone state-court class action—*except* that the counterclaim class action is not removable under the prevailing view of CAFA.

Experience shows that the "unfortunate loophole" Judge Niemeyer warned about in his dissenting opinion in *Palisades*, 552 F.3d at 345, has significantly undermined the goals of CAFA. Shortly after CAFA was enacted, a consultant who advised the class-action plaintiff (*i.e.*, the original defendant) in *Palisades* published a law review article encouraging class-action lawyers to exploit this loophole by filing their claims as counterclaims. Jay Tidmarsh, *Finding Room for State Class Actions in a Post-CAFA World: The Case of the Counterclaim Class Action*, 35 W. St. U. L. Rev. 193 (2007) (Tidmarsh). The author explains that "a consumer wishing to hold onto the state forum" for his class-action claim can evade CAFA's removal provisions by "filing a counterclaim class action." *Id.* at 198. Using that "tactic," the article boasts, "the state case suddenly transforms from an individual action with $75,000 or less at stake into a class suit with more than $5,000,000 at stake." *Id.* at 199. The author noted that, although that tactic had already been employed a number of times in the first two years after CAFA's enactment, those cases represented "just the tip of an approaching iceberg." *Ibid.* He was right. State courts have seen a proliferation of consumer-protection class actions filed as counterclaims in

ordinary collection actions, foreclosures, and contract disputes.*

The stakes for retailers such as Home Depot are high. Home Depot did not choose the state-court forum in this case and had no control over whether or where the original plaintiff filed its collection action. But because Jackson used the counterclaim tactic to avoid the removal jurisdiction that CAFA affords, Home Depot is stuck litigating a large class action in a state court of someone else's choosing. Indeed, this is the second class action filed against Home Depot in less than a year that uses this removal-avoiding technique—and the other one was filed in Madison County, Illinois, one of the jurisdictions Congress identified as a "'magnet' jurisdiction[]" for abusive class actions. Senate Report 13; *Tri-State Water Treatment*, 845 F.3d at 352. The stakes for financial institutions are just as high. As the class-action consultant warned in his 2007 article, "financial institutions will need to think carefully before they file collection actions in state courts in which they do not wish to defend their credit and lending policies" against class-action claims. Tidmarsh 199. In this very case, Citibank (the original plaintiff) ultimately abandoned its

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* For just a few recent examples, see, *e.g.*, *Ford Motor Credit Co. v. Jones*, — S.W.3d —, 2018 WL 1384505, at *2 (Mo. Ct. App. Mar. 20, 2018); *Credit Acceptance Corp. v. Hinton*, 2018 WL 793934, at *1 (Conn. Super. Ct. Jan. 16, 2018); *Midland Funding, LLC v. Raney*, 93 N.E.3d 724, 736 (Ill. App. Ct. 2018); *Polito v. Keybank Nat'l Ass'n*, 237 So. 3d 361, 362 (Fla. Dist. Ct. App. 2017); *Dupreez v. GMAC, Inc.*, 2017 WL 6016592, at *2 (Md. Ct. Spec. App. Dec. 5, 2017); *Epps v. Bank of Am. N.A.*, 2017 WL 5513258, at *1 (Md. Ct. Spec. App. Nov. 17, 2017); *Bank of Am. v. All About Drapes, Inc.*, 2017 WL 4127489, at *4 (Ill. App. Ct. Sept. 15, 2017).

collection action to avoid being enmeshed in the state-court class action. Class actions were not created for the purpose of deploying that type of coercive pressure—and Congress certainly did not intend to facilitate such behavior when it cracked down on class-action abuses by enacting CAFA.

This Court's immediate intervention is warranted to correct the courts of appeals' counter-textual interpretation of CAFA's removal provision. This Court has denied review on this issue several times. But the problem is not resolving itself—and it will neither resolve itself nor ripen into to a circuit split because courts of appeals view their erroneous interpretation of CAFA as compelled by this Court's broad language in *Shamrock Oil*. Only this Court can clarify the scope of its holding in *Shamrock Oil* and restore CAFA to its intended role in stemming class-action abuses in state courts.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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April 23, 2018

APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-1627

GEORGE W. JACKSON,
Third Party Plaintiff – Appellee,

v.

HOME DEPOT U.S.A., INCORPORATED,
Third Party Defendant – Appellant,

and

CAROLINA WATER SYSTEMS, INC.;
CITIBANK, N.A., Defendants.

Appeal from the United States District Court
for the Western District of North Carolina,
at Charlotte. Graham C. Mullen, Senior District
Judge. (3:16-cv-00712-GCM)

Argued: December 5, 2017
Decided: January 22, 2018

Before NIEMEYER, SHEDD and DUNCAN, Circuit Judges.

Affirmed by published opinion. Judge Duncan wrote the opinion, in which Judge Niemeyer and Judge Shedd joined.

* * *

DUNCAN, Circuit Judge:

Third-Party Defendant Home Depot U.S.A., Inc., filed a Petition for Permission to Appeal the district court's order remanding this case to state court. This court deferred ruling on Home Depot's Petition for Permission to Appeal pending consideration of the merits of the appeal. Home Depot argues that it is entitled to remove the class action counterclaim against it despite Fourth Circuit precedent to the contrary because either the Supreme Court has called this precedent into question or it is distinguishable here. Home Depot also appeals the district court's denial of its motion to realign the parties.

We grant Home Depot's Petition for Permission to Appeal. For the reasons that follow, we affirm both the district court's decision to remand this case to state court and its denial of Home Depot's motion to realign the parties.

I.

On June 9, 2016, Citibank, N.A., filed a debt collection action against George W. Jackson in the District Court Division of the General Court of Justice of Mecklenburg County, North Carolina. Citibank alleged that Jackson failed to pay for a water treatment system he purchased using a Citibank-issued credit card. On August 26, 2016, Jackson filed an Answer in which he asserted a counterclaim against Citibank and third-party class action claims against Home Depot and Carolina Water Systems, Inc. ("CWS").

Jackson alleged that Home Depot and CWS engaged in unfair and deceptive trade practices by misleading customers about their water treatment systems, and that Citibank was jointly and severally liable to him because Home Depot "directly sold or assigned the transaction to" Citibank. J.A. 51. On September 23, 2016, Citibank voluntarily dismissed its claims against Jackson without prejudice.

Home Depot filed a notice of removal on October 12, 2016, citing federal jurisdiction under the Class Action Fairness Act of 2005 ("CAFA"). Home Depot asserted that its notice of removal was timely under 28 U.S.C. § 1446(b) because it was filed within thirty days of its September 12, 2016, receipt of Jackson's counterclaim. On October 28, 2016, Home Depot moved to realign the parties with Jackson as plaintiff and Home Depot, CWS, and Citibank as defendants. On November 8, 2016, Jackson moved to remand. On November 18, 2016, Jackson amended his third-party complaint to remove any reference to Citibank.

The district court denied Home Depot's motion to realign because it concluded that this was not a case "where there are antagonistic parties on the same side," and granted Jackson's motion to remand because Home Depot did not meet the removal statute's definition of "defendant." *See Citibank, N.A. v. Jackson*, No. 3:16-CV-00712-GCM, 2017 WL 1091367, at *2-4 (W.D.N.C. Mar. 21, 2017).

II.

We review de novo the district court's decision to remand to state court. *See Quicken Loans Inc. v. Alig*, 737 F.3d 960, 964 (4th Cir. 2013). We also review de novo the district court's refusal to realign the parties,

but review the district court's factual determinations on this point for clear error. *See Prudential Real Estate Affiliates, Inc. v. PPR Realty, Inc.*, 204 F.3d 867, 872-73 (9th Cir. 2000).

Under the general removal statute, "any civil action brought in a State court of which the district courts of the United States have original jurisdiction[] may be removed by the defendant or the defendants" to the appropriate district court. 28 U.S.C. § 1441(a). Section 1446 establishes the procedure for removal under § 1441 and other sections.

In *Shamrock Oil & Gas Corp. v. Sheets*, the Supreme Court concluded that the predecessor to § 1441 did not permit an original plaintiff to remove a counterclaim against it. 313 U.S. 100, 108 (1941). The Court contrasted the statute, which authorized removal "by the defendant or defendants therein," with other statutes that had allowed removal by "either party," and held that Congress's choice of words indicated "the Congressional purpose to narrow the federal jurisdiction on removal." *See id.* at 104, 107. While § 1441 was not before the Court in *Shamrock Oil*, § 1441 uses similar language to its predecessor and allows removal by "the defendant or the defendants." Courts therefore interpret § 1441 in accordance with *Shamrock Oil*. *See, e.g.*, *Westwood Apex v. Contreras*, 644 F.3d 799, 805 (9th Cir. 2011); *First Nat'l Bank of Pulaski v. Curry*, 301 F.3d 456, 462-63 (6th Cir. 2002).

Congress, however, has expanded removal authority for class actions. It enacted CAFA "to curb perceived abuses of the class action device which, in the view of CAFA's proponents, had often been used to litigate multi-state or even national class actions in state

courts." *Tanoh v. Dow Chemical Co.*, 561 F.3d 945, 952 (9th Cir. 2009). To that end, CAFA, and in particular 28 U.S.C. § 1453(b), was adopted to extend removal authority beyond the traditional rules.

Section 1453(b) states that a class action filed in state court may be removed "in accordance with section 1446 (except that the 1-year limitation under section 1446(c)(1) shall not apply), without regard to whether *any defendant* is a citizen of the State in which the action is brought, except that such action may be removed by *any defendant* without the consent of all defendants." 28 U.S.C. § 1453(b) (emphases added). Section 1453(b) thus refers to § 1446, which establishes the procedures for removal.

This court has interpreted § 1453(b) to eliminate three of the traditional limitations on removal. *See Palisades Collections LLC v. Shorts*, 552 F.3d 327, 331 (4th Cir. 2008) (citing *Progressive W. Ins. Co. v. Preciado*, 479 F.3d 1014, 1018 n.2 (9th Cir. 2007)). First, it eliminates the rule that the defendant cannot remove a case filed in its home forum. *Id.* Second, it eliminates the rule that a defendant cannot remove a case that has been pending in state court for more than one year. *Id.* Third, it eliminates the rule requiring unanimous consent of all defendants for removal. *Id.*

This court has also held that CAFA's expanded removal authority does not allow removal of a class action counterclaim asserted against an additional counter-defendant.[1] *See id.* at 336. *Palisades* ad-

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[1] *Palisades* described a defendant, not the original plaintiff, named in a counterclaim as an "additional counter-defendant," and we adopt that language here. Home Depot's caption in this

dressed facts similar to those presented here,[2] and concluded that an additional counter-defendant was not "the defendant or the defendants" with removal authority under § 1441(a). *Id.* First, *Palisades* applied *Shamrock Oil* and held that an additional counter-defendant was not "the defendant or the defendants" because it was not a defendant against whom the original plaintiff asserted a claim. *Id.* Second, it emphasized that "Congress has shown the ability to clearly extend the reach of removal statutes to include counter-defendants, cross-claim defendants, or third-party defendants," but § 1441(a) refers only to "the defendant or the defendants," which supports a narrow view of removal under that provision. *Id.* at 333-34. Third, it observed that this conclusion was consistent with the obligation to construe removal jurisdiction strictly. *Id.*

Palisades also held that an additional counter-defendant was not "any defendant" entitled to removal

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case is "Third Party Defendant," but any suit by a defendant against the plaintiff, including any properly joined claims, is a counterclaim. *Id.* at 329 n.1. A counter-defendant need not also be the original plaintiff. *Id.*

[2] In *Palisades*, the plaintiff initiated a collection action in state court to recover unpaid charges plus interest owed on a cell-phone service contract. *Id.* at 329. The original defendant filed an answer denying the complaint's allegations and asserting a counterclaim against the original plaintiff. *Id.* The original defendant later filed an amended counterclaim joining an additional counter-defendant and moved for class certification. *Id.* The additional counter-defendant removed to federal court. *Id.* The original defendant moved to remand on the grounds that the additional counter-defendant was not a "defendant" pursuant to § 1441. *Id.* at 329-30. The district court granted the motion to remand, and we affirmed. *Id.* at 330, 337.

under § 1453(b). *Id.* at 334. First, it concluded that because an additional counter-defendant was not "the defendant or the defendants" under § 1441(a), it could not be "any defendant" under § 1453(b). *Id.* It reasoned that "any" did not change the meaning of "defendant," and that the inclusion of "any" at most allowed removal by a party that met the existing definition of "defendant." *Id.* at 335. Second (and relatedly), it examined the text of § 1453(b) and concluded that the two references to "any defendant" eliminated specific removal restrictions but did not expand the definition of "defendant." *Id.* at 335. According to the court, the phrase "without regard to whether *any defendant* is a citizen of the State in which the action is brought" merely eliminated the home-state defendant rule. *See id.* And the phrase "may be removed by *any defendant* without the consent of all defendants" merely eliminated the unanimity requirement. *See id.* In the context of construing § 1453(b) as well, *Palisades* observed that "this conclusion is consistent with our duty to construe removal jurisdiction strictly and resolve doubts in favor of remand." *Id.* at 336.

Since this court's decision in *Palisades*, other courts have considered whether an additional counter-defendant can remove a class action counterclaim. *Palisades*'s conclusion that an additional counter-defendant cannot remove a class action has been adopted by at least two other circuits. *See Tri-State Water Treatment, Inc., v. Bauer*, 845 F.3d 350, 355-56 (7th Cir. 2017) (reaching the same conclusion and stating that "[t]he only two circuits that have squarely addressed this issue agree with us"); *Contreras*, 644 F.3d 799 (the other decision cited by *Tri-State*).

III.

Home Depot argues that it is entitled to remove Jackson's counterclaim for two reasons. It first argues that the Supreme Court has cast doubt on the assumptions that underpinned this court's decision in *Palisades*, and that we must therefore reconsider whether an additional counter-defendant is entitled to remove a class action counterclaim. In particular, Home Depot claims that the conclusion in *Palisades* that an additional counter-defendant is not "any defendant" with removal authority under § 1493(b) does not survive the Supreme Court's decision in *Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 547 (2014). Home Depot argues that *Dart Cherokee* called into question the application of *Shamrock Oil*'s interpretation of "defendant" in the class action context.

Alternatively, Home Depot argues that even if *Palisades* survives *Dart Cherokee*, *Palisades* is inapplicable here because Citibank, the original plaintiff, is no longer a party in this case. Home Depot argues that it is a defendant in Jackson's counterclaim, the sole live action remaining, and thus is entitled to remove under § 1446(b). Because our analysis is constrained by the intricate timeline before us, we note again that on August 26, 2016, Jackson filed his counterclaim; on September 23, 2016, Citibank voluntarily dismissed its claims against Jackson without prejudice (but remained a counter-defendant in Jackson's counterclaim); on October 12, 2016, Home Depot filed its notice of removal; on October 28, 2016, Home Depot moved to realign the parties; on November 8, 2016, Jackson moved to remand; and on November 18, 2016, Jackson amended his counterclaim to drop his claims

against Citibank. Only at that point was Citibank no longer a party to this dispute.

Finally, Home Depot argues that the district court erred by failing to realign the parties. Home Depot apparently seeks to be captioned as a "defendant" in order to strengthen its argument that it is a defendant under the removal statutes.

For the reasons that follow, we disagree. We conclude that our decision in *Palisades* survives *Dart Cherokee* and is applicable here. We also affirm the district court's denial of Home Depot's motion to realign the parties. We address each argument in turn.

A.

Home Depot first argues that *Palisades* does not survive *Dart Cherokee* because the "Supreme Court's rejection of the anti-removal presumption in *Dart Cherokee* undermines *Palisades*'s reasoning" and calls into question the application of *Shamrock Oil* under CAFA because of the unique federalism interests present in class action cases. *See* Appellant's Br. at 22. We disagree. We hold that the Supreme Court has not called into question *Palisades*'s conclusion that an additional counter-defendant is not entitled to remove under § 1441(a) or § 1453(b), nor has it abandoned *Shamrock Oil*'s definition of "defendant" in the class action context.

In *Dart Cherokee*, the Supreme Court held that a defendant's notice of removal need only include a plausible allegation that the amount in controversy exceeds the jurisdictional threshold. *Dart Cherokee*, 135 S. Ct. at 553-54. In so holding, the Supreme Court remarked that "no antiremoval presumption attends cases invoking CAFA, which Congress enacted to

facilitate adjudication of certain class actions in federal court." *Id.* at 554.

Home Depot argues that *Palisades*'s "application of the 'original defendant' rule was based, in substantial part, on a flawed premise that the 'anti-removal presumption' applies to CAFA." Appellant's Br. at 21. This characterization appears to be based on *Palisades*'s interpreting § 1453(b) "consistent with our duty to construe removal jurisdiction strictly and resolve doubts in favor of remand." *See Palisades*, 552 F.3d at 336. But it is possible to construe removal strictly without applying an anti-removal presumption. The Seventh Circuit recently did precisely that in holding that § 1453(b) did not expand removal authority to an additional counter-defendant in a class action while explicitly noting the absence of an anti-removal presumption in the CAFA context. *Tri-State*, 845 F.3d at 356. Moreover, *Palisades* itself recognized that CAFA expanded removal authority, noting that "[t]hrough CAFA, Congress expanded federal diversity jurisdiction by amending 28 U.S.C. § 1332," and that "we are cognizant of the fact that Congress clearly wished to expand federal jurisdiction through CAFA." *See Palisades*, 552 F.3d at 331, 336. Accordingly, we conclude that the strict construction of the removal statute in *Palisades* did not reflect an anti-removal presumption.

Nor can we conclude that *Palisades* applied an anti-removal presumption by utilizing *Shamrock Oil*'s definition of "defendant" in the class action context. The analytical focus of *Palisades* was on interpreting the word "defendant" in § 1441(a) and § 1453(b) to have the same meaning in both provisions. Since the definition of the term "the defendant or the

defendants" in § 1441(a) was well-established and the provision was not amended by CAFA, we concluded that § 1453(b)'s two references to "any defendant" did not change the meaning of § 1441(a) or extend a right of removal under § 1453(b) to additional parties. To give the term "defendant" in these interlocking removal statutes different meanings would render the provisions "incoherent." *See First Bank v. DJL Props., LLC*, 598 F.3d 915, 917 (7th Cir. 2010). When Congress uses a term with a well-established meaning, we presume—absent evidence otherwise—that Congress intends to adopt that meaning, because Congress is presumed to be aware of judicial interpretations. *See id.*

As the Seventh Circuit noted in rejecting an argument identical to that presented here, "there is not a whisper in *Dart Cherokee* of any move to overrule *Shamrock Oil*. If that is where the Supreme Court is going, it will have to get there on its own; it is not for us to anticipate such a move." *Tri-State*, 845 F.3d at 356. We agree. If the Supreme Court believes that CAFA expanded the meaning of "defendant," it will say so directly. We decline to upend so settled a definition as "defendant" without clear direction from the Supreme Court. We therefore hold that *Dart Cherokee* did not undermine *Palisades*'s interpretation of § 1441(a) and § 1453(b).

B.

Alternatively, Home Depot seeks to distinguish *Palisades* on the grounds that it is a defendant—not a counter-defendant or a third-party defendant—in the only live dispute in this case. As such, it contends that it is entitled to remove because § 1446(b)(2)(B) allows each defendant "30 days after receipt by or service on

that defendant of the initial pleading or summons . . . to file the notice of removal." But at the time Home Depot filed for removal, Citibank—the original plaintiff—remained a counter-defendant. We therefore hold that Home Depot cannot avoid *Palisades* merely because Citibank had dismissed its claims against Jackson.

In reaching this conclusion, we pay particular attention to the complex timeline of events in this case. While Citibank is no longer a party to this dispute, it remained a counter-defendant when Home Depot filed its notice of removal, which is when we evaluate removability. *See Francis v. Allstate Ins. Co.*, 709 F.3d 362, 367 (4th Cir. 2013). When Home Depot filed its notice of removal on October 12, 2016, Jackson's counterclaim still asserted claims against Citibank. Indeed, Jackson still asserted claims against Citibank when he filed his motion to remand on November 8, 2016. Because Citibank remained a counter-defendant when Home Depot filed its notice of removal, we cannot give weight to the fact that Jackson later dropped his claims against Citibank. The only relevant distinction between this case and *Palisades* is that here the original complaint had been voluntarily dismissed without prejudice when Home Depot filed its notice of removal.

Against this backdrop, we hold that Home Depot is not entitled to remove Jackson's counterclaim. First, this result is most consistent with our precedent governing removal under § 1441(a) and § 1453(b). We have consistently allowed removal only by parties against whom the original plaintiff asserts claims and have never conditioned this rule upon the viability of the original complaint. *See Palisades*, 552 F.3d at 333.

As we stated previously, we pay close attention to the fact that at the time Home Depot filed its notice of removal, Citibank remained a counter-defendant in this case even though it had voluntarily dismissed without prejudice its claim against Jackson. We need not decide how § 1441(a) and § 1453(b) would apply if, at the time Home Depot filed its notice of removal, Jackson had dropped his counterclaim against Citibank.

Second, allowing Home Depot to remove would give the original plaintiff—who in North Carolina has broad power to voluntarily dismiss its complaint, *see* N.C. Gen. Stat. § 1A-1 Rule 41(a)—the power to decide whether a counterclaim against it is adjudicated in federal court. Citibank's voluntary dismissal of its complaint cannot make an existing counterclaim against Citibank and others removable. If it did, Citibank would have de facto removal authority in contravention of the rule that an original plaintiff cannot remove a counterclaim against it.

Third, allowing Home Depot to remove would invite gamesmanship. When Jackson filed his counterclaim, Home Depot could not remove because it was not a party against whom Citibank initially brought a claim. *See Palisades*, 552 F.3d at 333. If Home Depot could now remove Jackson's counterclaim, an original plaintiff counter-defendant could voluntarily dismiss its complaint without prejudice in order to disrupt unfavorable proceedings in state court, and, given CAFA's expanded removal authority, an additional counter-defendant could then remove the counterclaim to federal court. The original plaintiff might later attempt to reinstate its state court action, creating parallel proceedings in state court.

At the time Home Depot filed its notice of removal, the original plaintiff remained a party in the counterclaim Home Depot tried to remove. Allowing Home Depot to remove the counterclaim against Home Depot, Citibank, and CWS would be inconsistent with our prior interpretations of CAFA's removal statute. Accordingly, we conclude that Home Depot cannot escape the holding of *Palisades*.

C.

In an attempt to bolster its argument that it is a defendant entitled to file a notice of removal under § 1446(b)(2)(B), Home Depot appeals the district court's denial of its motion to realign the parties. Because this case does not involve an attempt to artificially manufacture diversity jurisdiction, we affirm the district court's denial of Home Depot's motion to realign.

Judicial realignment of the parties prevents the creation of sham diversity jurisdiction. *Faysound Ltd. v. United Coconut Chems. Inc.*, 878 F.2d 290, 295 (9th Cir. 1989). "Diversity jurisdiction cannot be conferred upon the federal courts by the parties' own determination of who are plaintiffs and who are defendants. It is [the Supreme Court's] duty, as it is that of the lower federal courts, to look beyond the pleadings and arrange the parties according to their sides in the dispute." *Indianapolis v. Chase Nat'l Bank of City of N.Y.*, 314 U.S. 63, 69 (1941). In determining whether to realign the parties, this court employs the "principal purpose" test, in which we determine the primary issue in controversy and then align the parties according to their positions with respect to that issue. *U.S. Fidelity & Guar. Co. v. A&S Mfg. Co., Inc.*, 48 F.3d 131, 133 (4th Cir. 1995).

In its rush to claim applicability of the principal purpose test, Home Depot ignores the reason realignment exists at all. Realignment ensures that parties do not artfully draft pleadings in order to escape "the mandate that courts carefully confine their diversity jurisdiction to the precise limits that the jurisdictional statute, pursuant to Article III, has defined." *See id.* Because no party contends that this case involves an attempt to fraudulently manufacture diversity jurisdiction, we need not delve too deeply into the issue of realignment. In the absence of a compelling reason to apply principles of realignment outside their traditional domain, we affirm the district court's denial of Home Depot's motion to realign the parties.

IV.

For the foregoing reasons, the district court properly declined to realign the parties and correctly remanded this case to state court. Accordingly, the judgment of the district court is

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

CIVIL ACTION NO. 3:16-CV-00712-GCM

CITITBANK, N.A., Plaintiff,

v.

GEORGE W. JACKSON, Defendant.

GEORGE W. JACKSON, Counter-Plaintiff
and Third-Party Plaintiff,

v.

HOME DEPOT U.S.A., INC., CAROLINA WATER
SYSTEMS, INC., Third-Party Defendants.

ORDER

THIS MATTER is before the Court on Third-Party Defendant Home Depot's Motion to Realign the Parties (Doc. No. 14), Defendant, Counter-Plaintiff, and Third-Party Plaintiff George W. Jackson's Motion to Remand (Doc. No. 23), Jackson's Memorandum in Opposition to Motion to Realign the Parties (Doc. No. 27), Home Depot's Response to Motion to Remand (Doc. No. 35), Home Depot's Reply to Response to Motion to Realign the Parties (Doc. No. 37), and Jackson's Reply to Reponses to Motion to Remand (Doc. No. 38).

1) Background

Jackson was sued by Plaintiff and Counterclaim Defendant Citibank NA ("Citibank") to collect an allegedly outstanding debt for a water filtration system purchased by Jackson from Home Depot and Counterclaim Defendant Carolina Water Systems ("CWS"). Jackson timely answered and asserted a Third Party class action complaint on August 26, 2016, alleging that Home Depot and CWS had a scheme of misleading customers about the alleged dangerousness of their water and subsequently selling them unnecessary water filtration systems. Jackson claims this scheme is an unfair and deceptive trade practice. Further, Jackson alleges Home Depot's and CWS's advertising and solicitation of water treatment system, offering free products and/or compensation to potential customers who agree to refer other purchasing customers, is a violation of North Carolina's Referral Sales Statute. G.S. § 25A-37. Citibank voluntarily dismissed its lawsuit without prejudice against Jackson on September, 23 2016.

Counter-Plaintiff Jackson asserts claims on behalf of himself and "[a]ll persons in the state of North Carolina that entered into a Home Improvement Agreement with Home Depot for 'water treatment' equipment." Complaint, ¶ 46. Further, Counter-Plaintiff Jackson asserts claims on behalf of himself and "[a]ll persons in the state of North Carolina that purchased a Water Treatment System from Carolina Water Systems, Inc., during the Class Period." *Id.*

On October 28, 2016 Third-Party Defendant Home Depot filed a Motion to Realign the Parties. On November 8, 2016 Counter-Plaintiff Jackson filed a Motion to Remand. The analysis for these motions

affect each other and so the Court's analysis handles both motions.

2) Standard of Review

28 U.S.C.A. § 1441, the general removal statute, provides that "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending." § 1441(a).

CAFA expanded federal diversity jurisdiction by conferring original federal jurisdiction over class actions in which "any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which—(A) any member of a class of plaintiffs is a citizen of a State different from any defendant." 28 U.S.C.A. § 1332(d)(2).

Plus Congress added 28 U.S.C.A. § 1453(b), which says:

> A class action may be removed to a district court of the United States in accordance with [28 U.S.C. §] 1446 (except that the 1-year limitation under section 1446(b) shall not apply), without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants.

"We begin with the undergirding principle that federal courts, unlike most state courts, are courts of limited jurisdiction, created by Congress with specified jurisdictional requirements and limitations.

Accordingly, a party seeking to adjudicate a matter in federal court must allege and, when challenged, must demonstrate the federal court's jurisdiction over the matter." *Strawn v. AT & T Mobility*, 530 F.3d 293, 296 (4th Cir. 2008) (citations omitted).

3) Analysis

A.

The analysis of whether third-party defendant Home Depot is allowed to remove a case to federal court is straight forward. There is clear Fourth Circuit precedent on this issue that says only the original defendant in a case is granted the power to remove. Home Depot argues that this precedent should no longer be followed. This Court disagrees as is explained below.

The Fourth Circuit has held that "an additional counter defendant is not a 'defendant' for purposes of § 1441(a)." *Palisades Collections LLC v. Shorts*, 552 F.3d 327, 333 (4th Cir. 2008). This holding is consistent with the Supreme Court case *Shamrock Oil & Gas Corp v. Sheets*, 61 S. Ct. 868 (1941) which courts have applied to "consistently refuse[] to grant removal power under § 1441(a) to third-party defendants—parties who are not the original plaintiffs but who would be able to exercise removal power under ATTM's interpretation." *Palisades*, 552 F.3d at 332.

Home Depot argues that the *Palisades* precedent that third-party defendants are not permitted to remove cases to federal court under § 1453(b) has since been overruled by the Supreme Court in *Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 547 (2014).

Interestingly, in a nearly identical case the Seventh Circuit Court of Appeals rejected the same argument made by Home Depot in its court. *Tri-State Water Treatment, Inc. v. Bauer v. Home Depot U.S.A., Inc.*, 845 F.3d 350 (7th Cir. Jan. 5, 2017). In *Bauer*, Tri-State Water Treatment brought a collection action against the Bauers for failing to pay for a water treatment system that Tri-State installed after doing a free, in-home assessment of the water in the Bauers' house. *Id.* at 352. The Bauers responded by filing a class-action counterclaim against Aquion, Inc. and Home Depot. *Id.* Home Depot timely filed a notice of removal. The similarities of the *Bauer* case to the current case before the Court are apparent. The district court in *Bauer* found that CAFA did not expand the parties entitled to removal beyond the original defendants and Home Depot appealed. *Id.*[1]

While decisions from other circuits are not precedential, they can be highly persuasive in the Court's analysis of a legal issue. *See, eg. Stuckey v. Colvin*, 2013 WL 6185837 (E.D. Va. Nov. 24, 2013); *Morrison v. Astrue*, 2011 WL 1303651 (W.D.N.C. Mar. 31 2011).

The Seventh Circuit's reaction in *Bauer* when Home Depot made the argument that *Dart Cherokee* has changed the analysis of the interpretation of which defendants have the power to remove is identical to this Court's reaction:

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[1] The Seventh Circuit found the Fourth Circuit case *Palisades* to be "directly on point, as it rejected an additional counter-claim-defendant's argument for removal under § 1453(b). The Fourth Circuit reasoned that the word 'any' did not change the well-established meaning of 'defendant.'" *Bauer*, 845 F.3d at 356 (citation omitted).

> This is slightly surprising because *Dart Cherokee* does not address the issue before us . . . there is not a whisper in *Dart Cherokee* of any move to overrule *Shamrock Oil*. If that is where the Supreme Court is going, it will have to get there on its own; it is not for us to anticipate such a move.

Bauer at 356.

The Court finds that *Dart Cherokee* did not overrule the holdings of *Shamrock Oil* and *Palisades* and therefore Home Depot, being not an original defendant, did not have the right to remove this case to federal court.

B.

In addition, Home Depot argues that the Court should first realign the parties making Home Depot the defendant in this case before reaching the question of remand. (Doc No. 36 at 7-8). It is argued that Jackson should be realigned as the Plaintiff and Home Depot and Carolina Water Systems should be realigned as the Defendants. Under this alignment, the removing party would arguable be a "defendant" for the purposes of the removal statute.

Federal courts have a "duty to look beyond the pleadings, and arrange the parties according to their sides in the dispute." *City of Indianapolis v. Chase Nat. Bank of City of N.Y.*, 314 U.S. 63, 69, 62 S. Ct. 15, 17 (1941) (internal quotation marks omitted). "The Fourth Circuit has adopted the two-step principal purpose test to assess the proper alignment of parties." *Wayne J. Griffin Elec., Inc. v. Travelers Prop. Cas. Co. of Am.*, 2014 WL 842983 (M.D.N.C. Mar. 4, 2014) (citing *Palisades*, 552 F.3d at 337). "Application of the

principal purpose test entails two steps. First, the court must determine the primary issue in the controversy. Next, the court should align the parties according to their positions with respect to the primary issue." *U.S. Fid. & Guar. Co. v. A & S Mfg. Co.*, 48 F.3d 131, 133 (4th Cir. 1995).

In this case the "principle purpose" for Citibank to file this suit was to collect Jackson's debt. On that issue, the parties were properly aligned. *See e.g. Arrow Financial Services, LLC v. Williams*, 2011 WL 9158435, at *4 (W.D. Mo. Jan, 20, 2011); *Palisades*, 552 F.3d at 337.

This is not a situation where there are antagonistic parties on the same side. Even if the parties were not properly aligned, a second consideration would weigh significantly against realignment. Prior to removal, Citibank dismissed its claim against Jackson *without prejudice*. In similar circumstances, courts have found that allowing realignment only to create federal jurisdiction would promote forum shopping. *See Chancellor's Leaning Sys., Inc. v. McCutchen*, 2008 WL 269535, at *3 (N.D. Ohio Jan 29, 2008) (explaining "[plaintiff] brought a breach of contact action in state court . . . [defendant] answered and filed a counterclaim asserting a claim under a federal statute. Thereafter, [plaintiff] ma[de] a strategic decision to dismiss its complaint without prejudice and remove the action . . . [that] claim has not been adjudicated and by dismissing without prejudice, [plaintiff] may intend to reassert the claim as a counterclaim [or setoff] in federal court if removal is permitted . . . the Court . . . will not re-align the parties to enable [plaintiff] to forum shop."); *see also*, *Arrow*, 2011 WL 9158435 at *4;

General Credit Accceptance, Co. LLC v. Deaver, 2013 WL 2420392 (E.D. Mo. June 3, 2013).

Since the parties are properly aligned according to the principal purpose test and realignment would only serve the purpose of forum shopping, the Court refuses to realign the parties.

4) Conclusion

For all the reasons set for forth above, it is hereby

ORDERED that Jackson's Motion to Remand (Doc. No. 23) is **GRANTED**; it is further

ORDERED that Home Depot's Motion to Realign the Parties (Doc. No. 14) is **DENIED**; it is further

ORDERED that all other pending motions are **DISMISSED WITHOUT PREJUDICE**, subject to refiling in the Superior Court of Mecklenburg County; it is further

ORDERED that this case is remanded to the Superior Court of Mecklenburg County.

SO ORDERED.

Signed: March 21, 2017

s/
Graham C. Mullen
United States District Judge